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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., and JOHN Z., pseudonyms for actual persons,

Petitioners,

-vs-

FRANK J. KELLY, Attorney General for the State of Michigan, and WILLIAM L. CAHALAN, Wayne County Prosecutor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the enforcement of Mich. Comp. Laws Ann. §§710.54 and 710.69 impermissibly intrudes upon the Petitioner's constitutionally protected zone of privacy and the decision of individuals, married or unmarried, to bear or beget children, by denying access to the state's adoption process.

2. Whether the enforcement of Mich. Comp. Laws Ann. §§710.54 and 710.69 results in an unwarranted gender-based discrimination between male and female infertility by prohibiting the practice of surrogate motherhood while allowing artifical insemination by donor.

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The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Michigan issued on August 10, 1982 in this proceeding.

OPINION BELOW

The rejection of Petitioner's application for leave to appeal to the Michigan Supreme Court, reported at 414 Mich. 875 (1982), appears in the Appendix hereto at p. 1a, along with the opinion of the Michigan Court of Appeals, reported at 106 Mich. App. 169, 307 N.W.2d 438 (1981) at p. 2a, and the unpublished opinion of the Wayne County, Michigan Circuit Court at p. 12a. The unpublished informal opinion of Judge James H. Lincoln of the Wayne County, Michigan Probate Court (Juvenile Division) is contained in the Appendix at p. 37a.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 5, 1981. A timely application for leave to appeal to the Michigan Supreme Court was denied on August 10, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws Ann. §710.54 (Supp. 1981) states in pertinent part:

(1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
(a) The placing of a child for adoption.
(b) The registration, recording, or communication of the existence of a person interested in adopting a child.
(c) A release.
(d) A consent.
(e) A petition.

(2) Before the entry of the final order of adoption, the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

Mich. Com. Laws Ann. §710.69 (Supp. 1981) provides in pertinent part that:

> A person who violates any of the provisions of Section 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony.

STATEMENT OF THE CASE

John Doe and his infertile wife, Jane Doe, together with Mary Roe, pseudonyms for actual persons, petitioned the Wayne County, Michigan Circuit Court to declare unconstitutional certain sections of the Michigan Adoption Code, Mich. Comp. Laws Ann. §§710.54 and 710.69. Under these statutes, the Does were prohibited from remunerating Mary Roe to conceive and bear a child with John Doe through artificial insemination. In compensation for providing the means for the birth of the biological progeny of Mr. Doe, Mrs. Roe would receive $5,000.00 plus expenses.

The statutes questioned dictate that the parties in the adoption process must file with the Probate Court for approval a sworn statement enumerating any monies or other valuables which passed as consideration between the parties.

Since the language of Mich. Comp. Laws Ann. §710.54(1) does not enumerate the specific charges and fees of which the Probate Court would approve, prior to filing their Complaint for declaratory relief, Petitioners sought an informal opinion from the Probate Court regarding the propriety of giving consideration to a surrogate mother. The Honorable James H. Lincoln, Judge of the Wayne County, Michigan Probate Court (Juvenile Division), refused to permit payment of a fee. (The text of the informal opinion is contained in the Appendix at p. 37a.)

In response to the unfavorable opinion of Judge Lincoln and in light of the unique nature of the concept of surrogate motherhood, Petitioners sought a declaratory judgment to insure that their proposed conduct would not violate the law. Petitioners also sought to enjoin Respondents, Frank J. Kelley, Attorney General for the State of Michigan, and William Cahalan, Wayne County, Michigan Prosecutor, from prosecuting Petitioners under the aforestated statutes.

The Honorable Roman S. Gribbs, Judge of the Circuit Court, Wayne County, Michigan, concluded that the questioned statutes were not constitutionally objectionable.

On Petitioners' appeal of right to the Michigan Court of Appeals the lower court decision was affirmed. The court of appeals held that the Petitioners'

arrangement was not within the realm of fundamental interests protected by the right of privacy. Petitioners' application for leave to appeal to the Michigan Supreme Court was denied without opinion.

REASONS FOR GRANTING WRIT

1. The Decision Below Is Inconsistent With The Decisions Of This Court Defining The Scope Of The Constitutionally Protected Right Of Privacy.

Mr. Justice Blackmun outlined the origins of the fundamental right of privacy in Roe v. Wade, 410 U.S. 113, 152 (1979).

In Griswold v. Connecticut, 381 U.S. 479 (1965), this Court held that a marital right of privacy was essential to the liberty guaranteed by the fourteenth amendment. Id. at 495.

Mr. Justice Brennan further extended the Griswold parameter of privacy in Eisenstadt v. Baird, 405 U.S. 438 (1972). This court, in the majority opinion, held:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (citations omitted).

In the instant case, the Michigan Court of Appeals affirmed Petitioners' contention that their decision whether to bear or beget a child constituted "a fundamental interest protected by the right of privacy..." Doe v. Attorney General, 106 Mich. App. 169, 173, 307

N.W.2d 438, 441 (1981). The refusal to recognize the zone of privacy to encompass the payment of consideration to a surrogate mother was based on the perception that such an arrangement was merely contractual. Id. at 173-74, 307 N.W.2d at 441.

Michigan courts have thus established what they perceive to be an improper reason for child bearing, a reason stripped of all constitutional protection. This perception is inconsistent with the firm position of this Court in which the right of privacy did encompass the decision of persons, married or single, whether to bear or beget children. In light of this conflict, a Writ of Certiorari is appropriate.

2. This Case Presents An Important Question Of Constitutional Law Which Has Not Been, But Should Be Settled By This Court.

In Carey v. Population Services International, 431 U.S. 678 (1977), this Court stated that:

> [T]he outer limits of the aspect of [personal] privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions [regarding] procreation [and] family relationships...

Id. at 684-85 (citations omitted). As the Court noted in Roe v. Wade, 410 U.S. 113, 155 (1973), where fundamental rights like the right to privacy are involved, the state may only justify regulation of such rights by demonstrating its "compelling interest" in the matter.

The Respondent asserts that prohibiting payment of a fee to surrogate mothers protects the best interests of

the child and prevents "baby bartering." Petitioners respond that the supervision of the Michigan Probate Court over all aspects of adoption proceedings, even without the reporting requirements of Mich. Comp. Laws Ann. §710.54, adequately protects the best interests of the child. Further, the state's concern over "baby-bartering" is inapplicable to the situation where the adoptee's natural parent is a co-petitioner in the adoption proceeding.

Indeed, eight states by statute specifically exclude from judicial scrutiny such payment of monies by adoption petitioners when one of the petitioners is the natural parent of the adoptee. Alaska Stat. §20.15.090(b); Ariz. Rev. Stat. Ann. §8-114(B); Cal. Civ. Code §244r; Fla. Stat. Ann. 63.132(3); Iowa Code Ann. §600.9(1)(d); Nev. Rev. Stat. §127.300(2); N.D. Cent.

Code §14-15-10(2); Okla. Stat. Ann. §866. (The text of these statutes is contained in the Appendix at p. 4la.)

Reimche v. First National Bank of Nevada, 512 F.2d 187 (3d Cir. 1975), reviewed the propriety and enforceability of an adoption contract between the natural parents of an illegitimate child. In upholding the agreement, the court stated that "[t]he fears that approval of such a policy would lead to the bartering or sale of children are not borne out where we deal only with agreements between parents or close family members." Id. at 190; see also, In re Shirk's Estate, 186 Kan. 311, 350 P.2d 1 (1960).

The Michigan Court of Appeals failed to decide whether the state's interest in this matter was a "compelling interest" so as to warrant regulation. This Court is encouraged to grant the instant Petition for Writ of Certiorari

so that this important question of constitutional law can be directly considered and decided by this Court.

3. The Decision Below Is Inconsistent With The Decisions Of This Court Regarding The Constitutionality Of Regulations Which Impose Significant Burdens On The Exercise Of Protected Conduct.

In Carey v. Population Services International, 431 U.S. 678 (1977), this Court held that since the state could not constitutionally ban the use of contraceptives by married or single persons, prohibiting against the dissemination or sale of contraceptives by anyone but a licensed pharmacist was violative of the right of privacy. By denying access to contraceptives, the state was in fact precluding the practice of contraception.

The same reasoning is applicable to the instant case. Under the prohibitions set forth in Mich. Comp. Laws Ann. §§710.54 and 710.69, surrogate mother contracts would rarely occur.

In Carey, the state ban was not total but it burdened access to contraceptives. In Doe v. Bolton, 410 U.S. 179 (1973), this Court held that a statute requiring that abortions be performed only in accredited hospitals was unconstitutional. The Court found the statute to be an unconstitutional burden on a woman's right to an abortion. The state limitation only reduced the opportunity of the petitioning party to exercise her protected right regarding child bearing.

Both in Carey and Bolton, this Court required proof by the state that the challenged requirements served a compelling state interest. Because the

Michigan Court of Appeals declined to determine the nature of the state's interest in this matter, this Court should hold the statutes in question unconstitutional in that the state has not met its burden of proof.

4. The Decision Below Is Inconsistent With The Decision Of This Court Recognizing Gender-Based Discrimination.

In Personnel Administration of Mass. v. Feeney, 442 U.S. 256 (1979), the Court addressed the constitutionality of a Massachusetts statute which granted preference in state job hiring to veterans.

To determine "purposeful discrimination" by the legislature, the Court proposed that, "when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the

statute in question], a strong inference that the adverse effects were desired can reasonably be drawn." Id, at 279.

In their decisions below, the Michigan courts declined to address the gender-based discriminatory impact of Mich. Comp. Laws Ann. §710.54 alleged by Petitioners. Petitioners agree that the statute is gender-neutral on its face, but assert that, as applied, it adversely affects Petitioner Roe and all other women similarly situated. The masculine counterpart to surrogate motherhood, is the "surrogate fatherhood" of a sperm donor in instances of artificial insemination by donor. "Surrogate fatherhood" is lawful in Michigan despite the fact that the semen is usually paid for and the sperm donor assumes none of the risk and burdens assumed by the "ovum donor."

Given the Michigan courts' refusal to address the issue and this Courts' holdings regarding facially neutral, gender-based discriminatory statutes, a Writ of Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the Petitioners hereby respectfully pray that their petition for Writ of Certiorari be granted.

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